Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-554

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

v.

ALBERT WILLIAM ZIMMER, JOHN P. ZIMMER, C. WILLIENELL ZIMMER HAYNES, ALFRED W. BROWN, ALICE E. BROWN JORDAN, GEORGE A. BROWN, LILLIAN F. BROWN SIMPSON, ALBERT L. BROWN, BURDETTE O. BROWN, ROBERT S. BROWN, CECIL L. BROWN AND JAMES C. BROWN,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HAROLD W. OCHSNER
OCHSNER & BAUGHMAN
705 Plaza One
Amarillo, Texas 79101

TABOR SCOTT
100 E. 5th Street
Amarillo, Texas 79101

Attorneys for Respondents
Albert William Zimmer
John P. Zimmer
C. Willienell Zimmer Haynes
Alfred W. Brown
Alice E. Brown Jordan
George A. Brown
Lillian F. Brown Simpson
Albert L. Brown
Burdette O. Brown
Robert S. Brown
Cecil L. Brown
James C. Brown

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
REASON FOR DENYING THE WRIT	3
CONCLUSION	6

TABLE OF AUTHORITIES

Gulf Oil Corporation v. *Southland Royalty Company*, 496 SW2d 547 (Tex. 1973)	4
Kohernot v. *Caldwell*, 231 SW2d 528 (Tex. Civ.App. Dallas 1950 Writ Ref.)	4
Maddox Motor Co. v. *Ford Motor Co.*, 23 SW2d 333 (Tex. Comm'n App. 1930, holding approved)	3

STATUTE CITATIONS

28 U.S.C., § 1254(1)	2

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, reported at 477 F. Supp. (1977), appears at Appendix A, pp. A-1 - A-17 for Petitioner's Petition. The opinion of the United States Court of Appeals, Fifth Circuit, 576 F. 2d 106 (1978) appears at Appendix B, pp. A-18 - A-20 for Petioner's Petition. The Court of Appeals affirmed the Judgment of the District Court, for the reasons set forth in the Memorandum Opinion of the District Court, cited above. On August 24, 1978, the Court of Appeals denied a petition for rehearing.

JURISDICTION

The asserted jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

The question presented as set forth in the petition is based on the erroneous assumption that the United States Court of Appeals, Fifth Circuit by affirming the Judgment of the District Court of the Northern District of Texas, decided the question presented in a conflict with applicable state law.

STATEMENT OF THE CASE

The "Statement of Facts" set forth in the petition (Pet. 3-4) is correct for the most part but omits certain facts which Respondents consider essential for a complete understanding of the case.

Respondents would point out to the Court that the original lease was for an original term of twelve (12) years from date of the lease;

> "and as much longer thereafter as oil or gas (or other minerals if produced here under) are produced on said land. Provided, that this lease shall not remain in force longer than fifty (50) years from this date." (Pet. App. C, A-22)

The amending agreement (Pet. App. C, A-34) described by Petitioner made no mention of, or no effort to change the fifty year life term of the original lease and paragraph one of section two of the amending agreement (Pet. App. C, A-34) contained the following:

> "It being the intention of the first party (the Lessor) by this instrument to grant an extension of one year in which a well may be commenced if the sum of $1280 be paid not later than January 15, 1936."

Other changes were made in the lease all of which dealt primarily with development and lease operations.

The Respondent represents to this court that the decision of the question presented will affect only the parties to this suit. When the construction of an oil and gas lease containing the same language or language with the same import is involved and presented to a court for construction the law is well settled by prior Texas decisions. The statement of Petitioner that the decision of the question presented will affect other persons who are parties to oil and gas leases containing the same language or language with the same import may or may not be true because Petitioner's statement assumes a similar situation with an amending agreement and there is no evidence of such similar leases with similar amending agreements being in existence.

REASON FOR DENYING THE WRIT

The question before the Trial Court was whether the amending agreement had eliminated the fifty (50) year term of the original lease, and modified the habendum clause.

Petitioner cites Maddox Motor Co. vs. Ford Motor Co., 23 S.W.(2) 333 Tex. Comm. App. 1930 (holding approved) as controlling on the question before the court. The Maddox case is not applicable. In the Maddox case (supra) the court had a written contract between Ford Motor Co. and an automobile dealership which had been modified by an oral agreement. This is clearly a different fact situation and the parties in the

Maddox case (supra) were not attempting to modify the habendum clause of an oil and gas lease.

Petitioner for the first time maintains that the lease and the amending agreement are ambiguous (Pet. 5), however in the trial court it was stipulated by counsel for all parties that the two instruments were not ambiguous as found by the Trial Court in its memorandum opinion. (Pet. App. A-8)

In order to modify the habendum clause of an oil and gas lease, any subsequent amending agreement must speak directly to the habendum clause. Gulf Oil Corp. vs. Southland Royalty Co. et al., 478 S.W.(2) 583 (Tex. Civ. App. 1972 El Paso), Affirmed 496 S.W. (2) 547 (Tex. Sup. CT. 1973) Kokernot vs. Caldwell, 231 S.W.(2) 528 Tex. Civ. App. Dallas, 1950 Writ Ref.

The Trial Court in its opinion (Pet. App. A-11) stated that the Southland cases (supra) were factually distinguishable because in the Southland cases the courts were concerned with a subsequent clause in the original lease, but that the Southland cases are controlling on the guidelines to be applied by a court in deciding the question of whether or not the habendum clause in a lease had been modified. The Southland cases (supra) restated and affirmed the principle that the habendum clause is controlling unless properly modified by subsequent words specifically directed to the habendum clause.

The paragraph in the amending agreement Sec. II, Paragraph 4 (Pet. App. C, A-36) which Petitioner contends modified the habendum clause of the original lease merely provided that the lessee could hold the lease by one well on both sections and dealt with development of the lease and does not refer specifically to the fifty (50) year life term of the lease.

Petitioner states that the amending agreement contained all the provisions necessary to constitute a separate oil and gas lease (Pet. 5). Respondent says that the amending agreement to constitute a lease by itself must have words of conveyance, warranty and must grant an estate. The amending agreement does not contain any words of conveyance, warranty, or grant an Estate and therefore cannot stand as a lease by itself.

The amending agreement was nothing more than an extension of the primary term and an agreement as to lease development as stated in the opening paragraph of Section II of the amending agreement (Pet. App. C, A-34) as follows:

> "The parties hereto desire to stipulate concerning the production of gas from said land, and concerning the drilling of a test well thereon. To this end, it is agreed between the parties hereto as follows . . . ."

Based on the foregoing, the decision in this case does not conflict with applicable state law, but in truth and fact applies the applicable law of State of Texas insofar as it deals with the construction of oil and gas leases.

CONCLUSION

For the foregoing reasons the Respondent respectfully submits to this court that the Writ of Certiorari to review the decision of the United States Court of Appeals, Fifth Circuit, should be denied.

Respectfully submitted,

HAROLD W. OCHSNER
OCHSNER & BAUGHMAN
705 Plaza One
Amarillo, Texas 79101

TABOR SCOTT
100 E. 5th Street
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